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Error to Circuit Court, Clarke County.

Action by the First National Bank of Berryville and Mrs. J. R. Elder against the Western Union Telegraph Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

McCormick & Smith, of Roanoke, *Geo. H. Fearons*, of New York City, *Hughes, Little & Seawell*, of Norfolk, for plaintiff in error.

A. Moore, Jr., and *Conrad Kownslar*, both of Berryville, for defendants in error.

STARKE *v.* COMMONWEALTH

Nov. 12, 1914.

[83 S. E. 545.]

Assault and Battery (§ 92*)—Conviction—Sufficiency of Evidence.—In a prosecution for malicious shooting with a pistol, evidence held not sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.* 1 Va.-W. Va. Enc. Dig. 739.]

Error to Circuit Court, Brunswick County.

F. W. Starke was convicted of malicious shooting with a pistol, and he brings error. Reversed.

Turnbull & Turnbull, of Lawrenceville, for plaintiff in error.
Attorney General, for the Commonwealth.

CHESAPEAKE & O. RY. CO. *v.* KIDD.

Nov. 12, 1914. Rehearing denied Jan. 12, 1915.

[82 S. E. 933.]

Railroads (§ 383*)—Injury to Person on Track—Contributory Negligence.—A person injured from being struck by a train while he was standing on the track conversing with an acquaintance could not recover from the railroad company, where he would have seen the approaching train had he not failed to look for same, and there was nothing to put the trainmen on notice that plaintiff was paying no heed to his danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1310; Dec. Dig. § 383.* 11 Va.-W. Va. Enc. Dig. 592.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Circuit Court, Botetourt County.

Action by one Kidd against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

J. M. Perry, of Staunton, for plaintiff in error.

C. M. Lunsford, of Fincastle, for defendant in error.

BROWN v. CAROLINA, C. & O. RY. CO.

Sept. 7, 1914.

[83 S. E. 981.]

1. Motions (§ 59*)—Final Order—Setting Aside.—Where a final order of dismissal is made in vacation, the court at a subsequent term has no authority to reopen the case and set aside the order.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. §§ 73-81; Dec. Dig. § 59.* 4 Va.-W. Va. Enc. Dig. 708.]

2. Appeal and Error (§§ 66, 344*)—Writ of Error—Time—Final Order.—On August 21, 1912, the court made a vacation order quashing the service of a summons because not signed or attested by the clerk, as required by Const. 1902, § 106 (Code 1904, p. ccxxxvi), and on September 26th overruled a motion to set aside the former order of dismissal. More than a year after the entry of the vacation order, plaintiff sued out a writ of error. Held, that if the vacation order was final, the writ of error was too late, and, if not final, then neither was the order denying the motion to set it aside, and was therefore insufficient to sustain the writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 329-331, 335-343, 1889-1893, 1896; Dec. Dig. §§ 66, 344.* 4 Va.-W. Va. Enc. Dig. 438, 497.

Error to Circuit Court, Scott County.

Action by one Brown against the Carolina, Clinchfield & Ohio Railway Company. A judgment was rendered dismissing the suit, and plaintiff brings error. On motion to dismiss. Granted.

Former opinion (82 S. E. 733) withdrawn.

John Kee and *Russell S. Ritz*, both of Bluefield, W. Va., for plaintiff in error.

S. H. Bond, of Gate City, and *Walter H. Robertson*, of Johnson City, Tenn., for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.